86-600 (3)

No. 86-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Petitioners,

-against-

LEE STERLING and THOMAS LA PIANA,

Respondents,

and

HOUSING COUNCIL OF NEW YORK, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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October 6, 1986

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DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON THE PETITION FOR REHEARING

LEE STERLING and THOMAS LAPIANA,
Plaintiffs-Appellants,

HOUSING COUNCIL OF NEW YORK, INC.,
Plaintiff-Intervenor-Appellant,

v.

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,
Defendants-Appellees.

Decided July 7, 1986

Before: NEWMAN, WINTER, Circuit Judges, and COFFRIN, District Judge.

ON PETITION FOR REHEARING

Appellees suggest that we

> may have overlooked [appellees'] argument . . . that a significant number of multiple dwellings have a resident janitor or superintendent on the premises who, unlike a tenant, may be reasonably expected to look after their employer's interests by forwarding the notice of violation to him. Since superintendents would be actively engaged in their duties at the premises during the same business hours when the SEA would post the notice, and, in most instances, are actual

> residents of the building, the likelihood of the janitor or superintendent seeing a notice affixed to the front door . . . is very great.

Appellees' Petition for Rehearing at 2. Appellees also bring to our attention, for the first time, provisions of the Administrative Code of the City of New York, Section D26-22.03 (Williams Press 1977, vol. 4 at 474 & Supp. 1985-1986 at 166), requiring owners of a multiple dwelling with nine or more units to provide full-time janitorial services.

We believe appellees' argument to be without merit. The magistrate specifically found that "in New York City, paper notices affixed to [multiple dwellings] have a very short life span, regardless of whether they are affixed out of the reach of small children." The presence of a janitor or superintendent somewhere in the building, therefore, only marginally improves the chances that a landlord will receive the

"nailed" summons. Moreover, the newly-cited ordinance requires only that a janitor live in the same block, albeit the owners must maintain in each building a sign with the janitor's name, address and telephone number.

Appellees' argument might carry weight had the provisions for nail and mail service provided, as they might easily have done, that the "nailed" summons be given directly to the superintendent or the janitor in a multiple dwelling. It contained no such requirement, however. Instead, it left it to chance that such a person would happen upon the "nailed" summons during its "very short life span."

The petition for rehearing is therefore denied.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Argued August 12, 1985; decided June 5, 1986

LEE STERLING and THOMAS LAPIANA,
Plaintiffs-Appellants,

HOUSING COUNCIL OF NEW YORK, INC.,
Plaintiff-Intervenor-Appellant,

v.

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,
Defendants-Appellees.

B e f o r e : NEWMAN and WINTER, Circuit Judges, and COFFRIN, District Judge.[1]

Plaintiffs Lee Sterling and Thomas Lapiana and plaintiff-intervenor Housing Council of New York, Inc. appeal from a judgment of the United States District Court for the Eastern District of New York (Jack

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[1]The Honorable Albert W. Coffrin, Chief Judge, United States District Court for the District of Vermont, sitting by designation.

B. Weinstein, Chief Judge), holding, inter alia, that chapter 623 of the New York Session Laws of 1979, which provides for "nail and mail" service of process, was constitutional. We reverse and hold that, as applied to absentee owners of multiple dwelling housing units in New York City, such service failed to meet constitutional requirements.

Reversed.

ARTHUR R. MILLER, Cambridge, Massachusetts (Lionel A. Marks, New York, New York, of counsel), for Plaintiffs-Appellants.

JOAN E. HANDLER, New York, New York (Frederick A. O. Schwartz, Jr., Corporation Counsel of the City of New York, Francis F. Caputo, Susan M. Shapiro, New York, New York, of counsel), for Defendants-Appellees.

WINTER, Circuit Judge:

Lee Sterling and Thomas Lapiana, two absentee landlords of multiple dwelling housing units in New York City, and the

Housing Council of New York, Inc., an umbrella organization of multiple dwelling landlord groups, appeal from a judgment upholding chapter 623 of the New York Session Laws of 1979 (formerly N.Y. City Charter § 1404(d)(2)) as constitutional. This statute once governed issuance of summonses for violations of New York City's sanitation code. Appellants claim, inter alia, that the "nail and mail" procedure provided by the statute failed to provide adequate notice of violations as required by federal due process. After extended proceedings covering several years, including a trial and several factfinding hearings before a magistrate, final judgment was entered for defendants. This judgment, which held the statute constitutional both on its face and as applied, was based in large part on: (i) the fact that appellees had complied with instructions from the district court to reform

their enforcement practices and to have the statute amended; and (ii) the assumption that there were no outstanding violations based on the earlier statute and enforcement practices that the City was seeking to enforce. Because default judgments against Sterling and Lapiana based on the earlier statute are still the subject of enforcement activity, we must address the merits. We find that chapter 623 was unconstitutional as applied to them, and reverse.

BACKGROUND

This action was brought to challenge the processes formerly used by New York City to enforce its sanitation code. The statute in question is Section 1404(d)(2) of the New York City Charter, as amended by chapter 623 of the 1979 New York Session Laws ("chapter 623" or "the 1979 statute"). Chapter 623 provided an alternative method to personal service for serving notice of

sanitation violations on offending building owners.[1] Use of this method required that a copy of the notice of violation be affixed in a conspicuous place on the building in question, with another copy mailed to "the person" on the premises upon whom service would be proper. This method of service is commonly referred to as nail and mail. Nail and mail service was to be used only after "a reasonable attempt has been made to deliver such notice to [an appropriate] person in such premises." 1979 N.Y. Laws ch. 623.

Sanitation Enforcement Agents ("SEA's"), who were street patrolmen employed by the Department of Sanitation, were responsible for detecting and citing violations of the sanitation code. When using nail and mail process, an SEA was to complete a summons listing relevant information such as the location of the

premises being cited, the time the violation was observed, and the nature of the violation (e.g., improper trash receptacles). The "nailed" copy of this "notice of violation" would be taped in a conspicuous place in the entranceway of the premises. The Environmental Control Board ("ECB"), the agency responsible for adjudication of sanitation violations, would then mail a copy of the notice to the same premises. This letter was usually addressed to "Agent." The notice constituted prima facie evidence of the violation and, if no response was received from a building owner, the ECB would enter a default judgment and impose a fine against the owner. Although substantial numbers of "mailed" notices of violation were returned as undelivered, the ECB made no attempt to record them upon return or to consider such a return as evidence of non-service.

In July 1980, plaintiffs Lee Sterling and Thomas Lapiana, who were the subjects of such default judgments, brought suit pursuant to 42 U.S.C. §§ 1983, 1985, 1988 and New York Civil Rights Law §11 (as later amended), alleging inter alia that nail and mail service was unconstitutional because it did not provide adequate notice under due process standards. They sought damages, declaratory relief and an injunction. In November, 1980, the Housing Council of New York, Inc. was granted leave to intervene.

In April, 1982, the case was tried before a jury in the Eastern District. At the close of the evidence, however, the judge dismissed the claims for damages under Section 1983, deemed the case an action in equity for declaratory and injunctive relief, and submitted the case to the jury as an advisory jury pursuant to Fed. R. Civ. P. 39(c). In answers to special interrogatories,

the jury made several findings favorable to plaintiffs, including a finding that the nail and mail process was not "fairly designed and applied to give notice in a reasonable period that the law has been violated." However, the judge entered an interim decision ruling in defendants' favor on all but one of the claims. The judge ruled that chapter 623 was constitutional on its face, relying largely on Greene v. Lindsey, 456 U.S. 444 (1982), a case decided after the jury in the instant case had made its findings.

The only issue left open was the constitutional validity of the nail and mail statute as applied. The district court found that "[t]here was considerable evidence adduced that, at least in its earlier stages, the program of enforcement was inadequately supervised, leading to unnecessary and unacceptable burdens on some property

owners." These enforcement difficulties were outlined in an October, 1980 report from the Sanitation Inspector General to the Commissioner of the New York Department of Sanitation ("Inspector General's report"). The report, a trial exhibit, was based on covert observation of randomly selected agents responsible for issuing the summonses. It revealed widespread abuse of the nail and mail process.[2] The district court noted, however, that changes in administration and procedure had occurred between the commencement of the suit and the time of trial. It ordered further hearings to determine, inter alia: (i) the extent of training and supervision of enforcement officers to ensure equitable and proper enforcement of the law; and (ii) the reliability of mailed notice in reaching the proper recipient. The case was then referred to a magistrate for hearings.

After holding hearings, the magistrate issued an extensive report on October 3, 1983, which recommended that chapter 623 be found constitutional as applied. As to the first issue, the magistrate's report found that "[s]ince January, 1981, the [Sanitation Department had] made a good faith effort to intensify the training, supervision and retraining of [SEA's] and to respond to complaints regarding violations cited and the allegedly improper use of nail and mail service of summonses."

On the second issue -- reliability of the mailed notice in reaching the intended recipient -- the report found that since 1981 the Department of Sanitation had followed a policy of dual mailings of copies of the violations. One copy was mailed to the address listed on the summons, and another copy was mailed to the person listed in the files of the New York City Department of

Housing and Preservation ("HPD"), or of the New York City Department of Finance, as the owner or managing agent of the building responsible for the violation. This was pursuant to a triennial registration program requiring owners of multiple occupant dwellings to register their address with HPD. Because HPD was phasing in a program of compiling such files over a three-year period, however, it appears that the second mailings were not made to all absentee landlords until 1984.

In November, 1983, the district court stated that it would accept the recommendation of the magistrate if the defendants proved that certain specified procedures were in place and if the defendants successfully sought to have Section 1404(d)(2) amended by the state legislature to codify the Department of Sanitation's evolving practice with respect to

mailing a notice to the address of the owner or managing agent as listed in the HPD's files.

In April, 1984, the judge denied an oral motion for class certification and referred all outstanding motions back to the magistrate. Final resolution of the case was delayed pending amendment of the statute. The amendment, chapter 944 of the 1984 New York Session Laws, became effective in August, 1984. In October, the magistrate issued a report finding that the defendants had complied with the conditions imposed by the trial judge. The report again recommended that Section 1404(d)(2) be found constitutional as applied.

On February 27, 1985, the judge closed the case. The final judgment adopted and incorporated the interim 1982 decision of the court, as well as the magistrate's prior reports and recommendations. The judgment

was entered on the understanding that there were no outstanding default judgments pending against plaintiff Lapiana, and that the ECB would reopen proceedings on all eleven default judgments pending against plaintiff Sterling. In dismissing the case, the judge stressed the great improvements that had been made during the course of the litigation and concluded that plaintiffs had received all the relief they had sought.

On appeal, plaintiffs contend, inter alia, that chapter 623 is unconstitutional, and that the district court erred in refusing to certify a class.

DISCUSSION

1. The Constitutional Claims

Appellants claim that the nail and mail method of serving process under the 1979 statute was unconstitutional as applied to absentee New York City landlords such as Sterling and Lapiana. They base their claim

partly upon alleged enforcement abuses prevalent during the early period following passage of the 1979 law, and partly upon the inadequacy of nail and mail as a method of serving sanitation summonses upon absentee owners or landlords. Because we base our decision on the latter ground, we do not reach the issues raised by the enforcement abuses in the early period.

In rebutting appellants' due process claims, appellees rely on the 1984 amended statute. They contend that the 1979 statute is now irrelevant. However, appellees are still seeking to enforce default judgments entered against Sterling and, although the record here is less clear, against Lapiana under the prior statutory scheme. If those default judgments are based on constitutionally invalid service of process, subsequent amendments to the governing law cannot validate the earlier judgments.

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). We do not believe that the 1979 statute provided such notice in the case of absentee landlords in New York City. "[A] statute . . . may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Notices posted on exterior doors of urban multiple residences may well disappear quickly due to forces human or natural, and absentee landlords are likely never to learn of such a notice. Tenants in urban settings

may have little incentive to protect the interests of absentee owners, and chance alone seems to be the principal determinant of whether the "nailed" notice reaches the owner.

In Greene v. Lindsey, 456 U.S. 444 (1982), the Supreme Court invalidated a statute that allowed notice of a forcible entry or detainer action to be posted on a tenant's door. The Court noted that in many cases posting would be likely to afford actual notice, id. at 452, but concluded that mere posting on an apartment door, without further steps such as mailing, did not satisfy the minimum standards of due process. Id. at 453. The likelihood that the posted notices in the instant case will reach the intended recipient is less than in Greene, because owners such as appellants do not live on the premises.

The mailing required by the 1979 statute did not make up for the deficiencies of the "nailed" notice so far as absentee landlords are concerned. The statute did not require that a copy of the summons be mailed to the business address of the property owner. Instead, it stated that "a copy shall be mailed to the person at the address of such premises." 1979 N.Y. Laws, ch. 623. "The premises" are merely the building where the notice was posted, while "the person" is apparently a reference to "a person in such premises upon whom service may be made." See supra note 1. A copy of the summons was thus mailed to the address where the citation was issued, usually bearing the additional notation "Agent" on the envelope.

Because many landlords do not receive mail at buildings they own and because "Agent" may not alert postmen to the

purpose of the mailing, the evidence shows that the mailed notices frequently did not reach the landlords. A substantial number of "mailed" notices were returned as undelivered but were not monitored by ECB. Rather, it entered a default judgment, which, in circumstances not relevant here, might later be reopened. Even when reopening was granted, moreover, a defendant was left to proving the negative of non-receipt by oral testimony because the ECB assumed that if the "mailed" notice was not delivered, the "nailed" notice would suffice.[3] Because we regard the "nailed" notice as wholly unreliable with regard to absentee landlords, we believe that the statute can be saved only if the "mailed" notice is constitutionally adequate standing alone. For the reasons stated, however, the required mailing is not reasonably calculated to provide notice to absentee landlords, cf.

Greene, 456 U.S. at 455, and default judgment against such landlords should not have been entered.

Appellees argue that appellants could have ensured their receipt of summonses merely by placing and monitoring an "owner's mailbox" at each of their buildings. However, the Supreme Court has made clear that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." Mennonite Board of Missions v. Adams, 462 U.S. 791, 799 (1983).

Finally, a statutory requirement that landlords register their mailing addresses with the City and that a copy of the mailed notice be sent to that address was feasible and would have greatly increased the likelihood of actual notice to absentee landlords. See Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962); Walker

v. City of Hutchinson, 352 U.S. 112, 116 (1956). In light of the deficiencies described above, the 1979 statute's failure to require this second mailing renders that law unconstitutional as applied to defendants,[4] because without it they were deprived of constitutional valid notice.[5]

2. Class Action Status

Appellants claim that the lower court erred in denying a motion to certify the case as a class action. This motion was made three and one-half years after commencement of the lawsuit, after a full trial, and after two extensive rounds of hearings before a magistrate. Whether a case should proceed as a class action is "peculiarly within the discretion of the trial judge," Becker v. Schenley Industries, Inc., 557 F.2d 346, 348 (2d Cir. 1977), and a party's failure to move for class certification until a late date is a valid reason for denial of such a motion.

See Green v. Philbrook, 576 F.2d 440, 446 (2d Cir. 1978). The district judge was thus well within his discretion in denying appellants' motion for class certification.

CONCLUSION

We find that the 1979 statute was unconstitutional as applied to absentee owners of multiple dwelling housing units against whom default judgments were entered. We remand to the district court for the issuance of appropriate injunctive and declaratory relief.

FOOTNOTES

1/ Chapter 623 amended §1401(d)(2) of the New York City Charter to read as follows:

> (2) The environmental control board shall not enter any final decision or order pursuant to the provisions of paragraph one of this subdivision unless the notice of violation shall have been served in the same manner as is prescribed for service of process by article three of the civil practice law and rules or article three of the business corporation law, except that service of a notice of violation of any provision of the charter or administrative code, the enforcement of which is the responsibility of the commissioner of sanitation and over which the environmental control board has jurisdiction, may be made by affixing such notice in a conspicuous place to the premises, the occupancy of which caused such violation, provided that such notice may only be affixed where a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporations law. When a copy of such notice has been affixed, pursuant to this paragraph, a copy shall be mailed to the person at the address of such premises; proof of such

> service shall be filed with the Environmental Control Board within twenty days; service shall be completed within ten days after such filing.

1979 N.Y. Laws, ch. 623.

2/ The October, 1980, Inspector General's report found that SEA's operated under a "guideline" that 20 summonses be issued daily, without regard to the type of service used. Because the SEA's found the nail and mail process entailed less work than personal service, perhaps over 90 percent of summonses were issued by that method. Further, many SEA's issued their daily quota of citations during the morning hours, writing afternoon times on some of the violation forms to create the appearance of day-long work. This particular abuse was facilitated by the use of nail and mail because no one on the spot could challenge the incorrect time written on the posted

notice. More than half (58.3%) of the SEA's observed had engaged in this activity at some point during the Inspector General's survey. Because nail and mail was so easy, some SEA's bypassed violations at buildings where personal service would be necessary, and then issued a nail and mail summons to an adjacent building. The Inspector General's Report concluded that "[t]he lack of proper field supervision [was] a major contributing factor to poor or improper performance by Sanitation Patrolmen."

3/ The effect of the statute is demonstrated by the proceedings against Sterling. He had several default judgments entered against him for violations between 1980-82. Chief Judge Weinstein ordered ECB to reopen those judgments. A hearing was held in 1985 at which Sterling claimed not to have received notice. This claim was rejected on the

grounds that "Sterling admits to not having personal knowledge of the facts and circumstances surrounding the issuance of each [notice of violation . . .] I find that respondent's explanation is insufficient to rebut respective prima facie cases herein." The problem faced by absentee landlords claiming a lack of service was of course aggravated by ECB's failure to monitor returned notices of violation in the period in question.

4/ Although dual mailings were not required by law until passage of the 1984 statute, the ECB apparently has, since 1981, gradually phased in a policy of landlord registration and of mailing an additional copy of the summons that address. This change was one of the reforms adopted under the supervision of the district court, and codification of this requirement was accomplished by the 1984

statute. Since the full implementation of this policy appears to have coincided roughly with the amendment requiring such a mailing, it cannot affect our ruling. Moreover, extrastatutory measures cannot render valid a statute unconstitutional on its face. See Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928). We see no reason why such measures can validate a statute invalid as applied to one group.

5/ We do not decide whether the 1979 statute provided adequate notice to owners of multiple residences who lived on the premises, although the question does not appear to merit serious consideration. The particular default judgments before us relate only to Sterling and Lapiana.

ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED FEBRUARY 27, 1985.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEE STERLING and THOMAS LAPIANA,

Plaintiffs,

HOUSING COUNCIL OF NEW YORK, INC.,

Plaintiff-Intervenor,

-against-

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Defendants.

WHEREAS, plaintiffs Lee Sterling, Lionel Alan Marks and Thomas LaPiana, owners or managing agents of multiple dwellings in New York City, instituted this action in July of 1980 against the Environmental Control Board of the City of New York ("ECB").

WHEREAS, by stipulation, on August 8, 1980 plaintiffs served and filed an amended complaint brought pursuant to 42 U.S.C. §§1983, 1985 and 1988 and Section 11 of the New York Civil Rights Law naming as defendants the ECB and the City of New York and claiming:

(1) that Section 1404(d)(2) of the New York City Charter ("Charter") as amended by Chapter 623 of the Laws of 1979 providing for "nail and mail" service of process of sanitation summonses on its face and as applied fails to afford building owners and agents due process;

(2) that the "nail and mail" statute is discriminatorily enforced against building owners and agents in violation of their rights to equal protection and due process;

(3) that building owners and agents are deprived of due process and a fair hearing of the charges against them because of the

dual prosecutory and adjudicatory role played by members of the ECB; and

(4) that the statutory minimum penalties for sanitation violations violate the federal and state constitutional proscriptions against excessive fines.

WHEREAS, on November 4, 1980, the Court granted leave to intervene to the Housing Council of New York, an umbrella organization of four groups of multiple dwelling landlords, that intervention was limited to the allegations raised in the amended complaint.

WHEREAS, on the morning of trial plaintiff Lionel Alan Marks withdrew his own causes of action in order to continue to act as plaintiffs' trial counsel.

WHEREAS, this case was tried before the Chief Judge and a jury on April 15, 16, 19, 22 and 23, 1982.

WHEREAS, after hearing plaintiffs', plaintiff-intervenor's and defendants' cases in full, the Chief Judge dismissed plaintiffs' claim for damages under Section 1983 for failure to sustain their burden of proof, submitted the case to the jury as an advisory jury and deemed the case an action in equity seeking declaratory and injunctive relief.

WHEREAS, the Chief Judge in a Memorandum and Order dated July 29, 1982 found Section 1404(d)(2) of the Charter constitutional on its face and rejected various other claims made by plaintiffs in the amended complaint.

WHEREAS, the Court also found that the constitutionality of Section 1404(d)(2) of the Charter as applied was less certain but there had been various changes in procedure and administration of the law both between the time suit was commenced and the time of

trial and between the time of trial and the present.

WHEREAS, the Chief Judge ordered that a hearing to be held to ascertain the current functioning of the system with respect to, among others, the following issues: (1) training and supervision of Department of Sanitation enforcement officers in the field in connection with their obligation to enforce the law equitably, to make reasonable attempts at personal service and to suitably affix notices; (2) the reliability of the mailed notice reaching its intended recipients as reflected in return mail statistics and new procedures to insure delivery and receipt, including improved listings of owners and agents of property; (3) assurance that mailed notices returned as undelivered are considered in determining not to penalize the intended recipient; and (4) other methods of

protecting the rights of property owners and agents.

WHEREAS, the parties appeared for trial on the aforementioned four issues which was scheduled for January 19, 1983, at which time plaintiffs orally moved to amend their complaint to allege improprieties in the enforcement and docketing of judgments for sanitation violations rendered by the ECB.

WHEREAS, on January 19, 1983, the Chief Judge granted plaintiffs' oral motion and permitted them to raise alleged docketing and collection improprieties.

WHEREAS, on January 19, 1983, the Chief Judge by oral order of reference referred the case to Magistrate John L. Caden for the purpose of conducting the aforesaid hearing and to supervise discovery on the alleged docketing and collection improprieties.

WHEREAS, hearings on the aforementioned four items concerning the constitutionality of "nail and mail" as applied were held before Magistrate Caden on February 2, 3, 8, May 26 and June 3, 1983.

WHEREAS, plaintiffs filed a supplemental complaint dated April 1, 1983.

WHEREAS, by motion dated June 2, 1983, defendants moved to strike the supplemental complaint, or in the alternative, to dismiss the supplemental complaint.

WHEREAS, the parties by their attorneys appeared for oral argument on June 23, 1983 on defendants' motion and plaintiffs' opposition thereof.

WHEREAS, the Chief Judge orally granted plaintiffs' motion to file the supplemental complaint, deemed that complaint denied by defendants and reaffirmed the earlier order of reference to Magistrate Caden to supervise discovery on

the alleged docketing and collection improprieties.

WHEREAS, Magistrate Caden issued a Report and Recommendation dated October 3, 1983 finding defendants' application of Section 1404(d)(2) of the Charter to be constitutional in all respects.

WHEREAS, plaintiffs then moved to vacate and set aside the Magistrate's Report dated October 3, 1983, for a preliminary injunction staying the docketing and enforcement of judgments rendered by the ECB and to set aside the Memorandum and Order dated July 29, 1982.

WHEREAS, the parties by their attorneys appeared for oral argument on November 16, 1983 on the plaintiffs' motions and defendants' opposition thereto.

WHEREAS, on November 16, 1983, the Chief Judge denied plaintiffs' oral motion to vacate judgments entered by the ECB and

attachments filed against plaintiffs Sterling and LaPiana and directed that individual applications to set aside judgments should be made before the ECB and, upon denial in that forum, by way of an Article 78 procedure.

WHEREAS, by Order dated November 28, 1983, the Chief Judge denied plaintiffs' motion seeking a preliminary injunction staying defendants' docketing and enforcement procedures, denied plaintiffs' motion to set aside the Memorandum and Order dated July 29, 1982, denied plaintiffs' motion to vacate the Report dated October 3, 1983 on the condition that defendants submit proof showing that the following procedures are in effect:

> a. that the affidavit of alternative service/posting which presently appears on the back of the white copy of the notice of violation which is issued by the Department of Sanitation is filled out and executed prior to filing such notices of violation with the

Environmental Control Board ("ECB");

b. that the appropriate affidavit(s) of mailing(s) for notices of violation which are issued by the Department of Sanitation are filled out and executed prior to filing such notices of violation with the ECB;

c. that the Department of Sanitation has a process that provides that it completes its mailing(s) of the notices of violation to respondents which it issues by "nail and mail" for alleged sanitation violations within five (5) business days of the date of offense/date of issuance (the first business day being defined as the business day after the alleged offense occurred);

d. that the ECB has a firm policy which is uniformly applied whereby when it receives a request to open a default judgment and its computer history of that notice of violation demonstrates that both mailings (where there have been ECB mailings to both the place of occurrence and respondent's address of record) have been returned as undelivered that such request is granted and the default is vacated and respondent granted a hearing;

e. that defendants have taken steps to seek an amendment of Section 1404(d)(2) of the Charter

of the City of New York to provide, in instances where resort is made to "nail and mail" issuance of a sanitation violations, [sic] for the codification of the existing practices of the Department of Sanitation with respect to additional mailings of notices of violation, and such an amendment has been adopted; and

f. that defendants shall reexamine the envelope in which notices of alleged sanitation violations are mailed to respondents by the Department of Sanitation to determine whether the envelope should carry additional official identification and accomplish this change.

WHEREAS, by motion dated February 17, 1984, plaintiffs moved pursuant to 15 U.S.C. §169f, the Fair Debt Collection Practices Act, to enjoin defendants ECB and its collection agents from using allegedly unfair collection activities; to vacate the judgments entered by the ECB and attachments filed against plaintiffs Sterling and LaPiana; for an order requiring the Department of Sanitation of the City of New York to computerize its returned mail which

it receives from issuance of notices of violation; for an order declaring that the Commissioner of Sanitation has no power to adopt regulations codifying the second mailing requirement; and for class certification.

WHEREAS, by motion dated March 6, 1984, defendants moved to compel plaintiffs and plaintiff-intervenor to respond to defendants' interrogatories and requests for documents dated July 27, 1983 relating to alleged collection and docketing improprieties.

WHEREAS, the parties by their attorneys appeared on April 3, 1984 before the Chief Judge, the Court denied plaintiffs' oral motion for class action certification.

WHEREAS, a hearing pursuant to the November 28th Order was held on April 3, 1984 before Magistrate John L. Caden.

WHEREAS, plaintiffs moved that this Court mark into evidence a report dated August 1984 by Assemblyman John C. Dearie and the New York State Assembly Standing Committee on Cities entitled "New York City's Sanitation Enforcement Policy" and that declaratory relief be granted accordingly.

WHEREAS, by Order dated September 22, 1984, the Chief Judge granted plaintiffs' motion insofar as it seeks to accept the above-mentioned report for purposes of judicial notice and denied the motion insofar as it seeks any declaratory relief.

WHEREAS, Magistrate Caden issued a Report and Recommendation dated October 19, 1984 finding that defendants have met their burden of proof in all respects and have shown compliance with the six procedures outlined by the Chief Judge in his Order of November 28, 1983 and

recommending that defendants' application of Section 1404(d)(2) of the Charter be found constitutional.

WHEREAS, Magistrate Caden issued a Report and Recommendation dated November 1, 1984 making the following recommendations: that plaintiff's motion pursuant to 15 U.S.C. §1692(f) seeking an order restraining defendant ECB and its collection agents from using allegedly unfair and unconscionable debt collection practices in order to collect ECB judgments be denied; that plaintiffs' motion to vacate the judgments entered by the ECB and the attachments filed against plaintiffs' Sterling and LaPiana be denied; that plaintiff's motion for an order requiring the Department of Sanitation of the City of New York to computerize its return mail which it receives from issuance of notices of violation be denied; that plaintiffs' motion for declaratory

relief finding that the Commissioner of Sanitation has no power to adopt regulations codifying the second mailing requirement as it would modify laws enacted by the New York State legislature be denied; that plaintiffs' motion for class certification be denied; and that defendants' motion to compel answers to interrogatories and production of documents be granted.

WHEREAS, plaintiffs then moved to vacate and set aside both the Magistrate's Report dated October 19, 1984 and his Report dated November 1, 1984.

WHEREAS, the parties by their attorneys appeared for oral argument on December 18, 1984 on the plaintiffs' motions to set aside each of the Magistrate's Reports and the defendants opposition thereto.

WHEREAS, the defendants by their attorney stipulated on the record on December 18, 1984, that defendant ECB will

reopen their proceedings on notices of violations number 029-734-880, 021-910-718, 021-489-353, 015-956-261, 021-122-137, 019-382-431, 016-001-857, 013-429-458, 013-730-409, 013-730-418 and 013-230-504 and schedule all of the eleven enumerated notices of violation for hearing with the issuing officer present, if available, on the same day before an administrative law judge.

WHEREAS, plaintiff Thomas LaPiana has no outstanding notices of violation pending before the ECB which are currently the subject of docketing, collection or enforcement activities.

IT IS HEREBY ORDERED AND ADJUDGED:

1. This Court's Memorandum and Decision dated July 29, 1982, which is set forth in full as Appendix A, is adhered to and incorporated herein.

2. The Magistrate's Report and Recommendation dated October 3, 1983, which is set forth in full as Appendix B, is adhered to, adopted in full and incorporated herein.

3. The Magistrate's Report and Recommendation dated October 19, 1984, which is set forth in full as Appendix C, is adhered to, adopted in full and incorporated herein.

4. The Magistrate's Report and Recommendation dated November 1, 1984, which is set forth in full as Appendix D, is adhered to, adopted in full and incorporated herein.

5. Because none of the pending notices of violation in issue are subject to any docketing or collection activity and because the statutory scheme for the issuance and adjudication of sanitation violations is constitutional on its face and as applied, any

allegations as to docketing and collection improprieties are moot.

6. Judgment is entered for the defendants and the case is hereby closed.

So Ordered.

Dated: Brooklyn, New York
February 27, 1985

JACK B. WEINSTEIN
Chief Judge

DECISION AND ORDER OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

LEE STERLING and THOMAS LAPIANA,

Plaintiffs,

-and-

HOUSING COUNCIL OF NEW YORK, INC.,

Plaintiff-Intervenor,

-against-

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Defendants.

WEINSTEIN, Ch. J.

Plaintiffs Lee Sterling and Thomas Lapiana, owners or managing agents of multiple dwellings in New York City, and plaintiff-intervenor the Housing Council of New York, an umbrella organization of four groups of multiple dwelling landlords,

challenge the recently enacted regulatory and procedural framework for the enforcement of New York City's laws relating to the cleanliness of the streets. Specifically, plaintiffs seek declaratory and injunctive relief against the City of New York and the City's Environmental Control Boar (ECB) on the following claims:

(1) that §1404(d)(2) of the New York City Charter as amended by Chap. 623 of the laws of 1979 providing for "nail and mail" service of process of sanitation summonses as applied fails to afford building owners and agents due process;

(2) that the "nail and mail" statute is discriminatorily enforced against building owners and agents in violation of their rights to equal protection and due process;

(3) that building owners and agents are deprived of due process and a fair hearing of the charges against them because of the

dual prosecutory and adjudicatory role played by members of the ECB; and

(4) that the statutory minimum penalties for sanitation violations violate the federal and state constitutional proscriptions against excessive fines.

The case was tried before the court and an advisory jury on April 15, 16, 19, 1982. The jury answered the following special questions:

1. Is the nail and mail process fairly designed and applied to give notice in a reasonable period that the law has been violated? No.

2. Have there been attempts with due diligence by Sanitation Officers to effect personal service upon responsible individuals, before using "nail and mail" service? No.

3. Can a person receive a fair and impartial hearing from the Administrative Law

Judges hearing violations in sanitation cases? No.

4. Is there a conflict of interest in the Commissioner of Sanitation or the Deputy Commissioner of Sanitation being a member of the Environmental Control Board? Yes.

5. Are the procedures of the Environmental Control Board fair and reasonable? No.

6. Are the fines imposed by the Environmental Control Board proportioned to the offense? No.

7a. Are there issuances of multiple violations? No.

b. Is this a violation of due process and equal protection? No.

8. Is the "nail and mail" scheme designed to give notice to the responsible individual? No.

9. Does the "nail and mail" enforcement program of the Department of

Sanitation discriminate against building owners? Yes.

Subsequent to the trial the Supreme Court decided Greene v. Lindsey, 102 S. Ct. 1874 (1982). On the basis of that decision it is clear that the New York statute satisfies in principle the constitutional requirement of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). The state may rely on a property owner to superintend his property and may premise a scheme of service of process on the assumption that a notice affixed to the premises will bring the proceeding to the attention of the responsible individual. Greene v. Lindsey, supra at 1879. The

second statutory requirement of notice mailed to the premises provides additional reliability that notice will be received by the affected parties and assures the soundness of the statutory notice. As the Greene opinion notes, after posting, "notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings." Id. at 1881.

The other claims with respect to the size of fines and procedures on adjudication were well within legislative powers, given the constitutionality of the basic method of notifying property owners. Property owners and agents are entitled to due process and the court recognizes the great service they provide in making available desperately needed housing. Nevertheless, it is the legislature not the courts that must resolve the conflict between competing interests so long as it does so within broad constitutional

boundaries. Given the serious problem faced by the City in keeping its streets clean while funds for municipal services have been drastically reduced, the courts must recognize the broad legislative discretion in meeting the problem.

Although plaintiffs have presented some evidence that the nail and mail statute is more frequently applied against owners of multiple dwellings than it is against other types of violators, they have failed to make the requisite showing that such selective treatment is based upon some impermissible consideration, such as race or religion, intent to inhibit or punish the exercise of some constitutional right, or malice, bad faith or intent to injure. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886); Le Clair v. Saunders, 627 F.2d 606 (2d Cir. 1980), cert. denied, 450 U.S. 959, 101 S. Ct. 1418 (1981).

Plaintiffs are afforded a fair and reasonable hearing on the charges against them before the administrative law judge (ALJ) of the ECB and by the Board itself which reviews recommendations of the ALJs and renders final decisions. Plaintiffs allege among other things that the fact that the ALJs are per diem employees precludes their rendering impartial recommendations to the ECB to which they are responsible; that the Department of Sanitation's interest in revenue taints the hearing process; that the ex officio role of the Commissioner of Sanitation, or his delegate, on the ECB having final adjudicatory authority creates a conflict of interest with his responsibility as chief enforcement officer of the sanitation laws and thus deprives plaintiffs of due process. Although the structure of the ECB and its relationship to the Department of Sanitation suggest that each performs both

judging and prosecuting roles such a combination of functions does not offend due process where, as here, the evidence does not "overcome a presumption of honesty and integrity in those serving as adjudicators." Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1975). In this era of agency proliferation examples of permissible mixing of such functions on an institutional level abound. The Commissioner or his designee sitting on the ECB is not personally directly engaged in either investigating or prosecuting the sanitation violations. Plaintiffs unsubstantiated allegations of a conflict of interest are insufficient to sustain their constitutional claim. See generally 2 Davis, Administrative Law Treatise § 13.02 (1958 and Supplement 1976).

With respect to the penalty structure, plaintiffs complain of the mandatory nature of the fines which precludes consideration of

mitigating circumstances and that the fines imposed by the ECB are excessive. The statute provides for civil penalties of not less than $25 nor more than $100 for containerization violations and of not less than $50 nor more than $250 for littering or sidewalk maintenance violations. Under the former penalty structure the City's recovery averaged $3.16 per issued summons and $9.43 per issued summons answered by personal appearance. The City concluded that the former fines and levels of recovery were both ineffective as deterrents and insufficient to meet the cost of enforcement. See Project Scorecard at 7, Defendant's Appendix 2. Considering the difficulties of policing the entire city, the importance of clean and sanitary streets, inflation and comparable increases in other penalties such as those for traffic offenses, the increased penalty structure is neither unreasonable nor

excessive. Nor does the mandatory character of the minimum fine violate the Constitution. Plaintiff's objection that mitigating circumstances may not be considered for the purpose of ameliorating the fine is not well taken; mitigating circumstances seem to be accounted for in connection with the affirmative defense of compliance by "reasonable efforts" which would lead to the more favorable result of dismissal of the violation. See Environmental Control Board, Sanitation Manual, Part I, §3.5 (Working Draft Oct. 1981), Defendant's Exhibit L.

The constitutionality of the nail and mail statute as applied is less certain. There was considerable evidence adduced that, at least in its earlier stages, the program of enforcement was inadequately supervised, leading to unnecessary and unacceptable burdens on some property

owners. Because of various changes in procedure and administration of the law both between the time suit was commenced and the time of trial and between the time of trial and the present, the court is not able to ascertain the current functioning of the system with respect to, among others, the following issues: (1) training and supervision of Department of Sanitation enforcement officers in the field in connection with their obligation to enforce the law equitably, to make reasonable attempts at personal service and to suitably affix notices; (2) the reliability of the mailed notice reaching its intended recipients as reflected in return mail statistics and new procedures to insure delivery and receipt, including improved listings of owners and agents of property; (3) assurance that mailed notices returned as undelivered are considered in determining not to penalize the

intended recipient; and (4) other methods of protecting the rights of property owners and agents.

Accordingly, the case is set down for a hearing on these matters on September 21, 1982, at 9:30 A.M. Additional evidence may be submitted with respect to modifications of the enforcement policies and practices of the Department of Sanitation and the ECB designed to remedy the abuses that came to light during the course of the trial. The parties are directed to submit proposed findings of fact and conclusions of law one week before the hearing in preparation for a final judgment.

So ordered.

Dated: Brooklyn, New York
July 29, 1982

JACK B. WEINSTEIN
Chief Judge